ACCEPTED
14-19-00154-CR
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
9/11/2020 4:57 PM
CHRISTOPHER PRINE
CLERK

No. 14-19-00154-CR

In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
9/11/2020 4:57:26 PM
CHRISTOPHER A. PRINE
Clerk

No. 1527611
208th District Court
Harris County, Texas

THE STATE OF TEXAS
Appellant
V.
JOHN WESLEY BALDWIN
Appellee

APPELLEE'S MOTION FOR EN BANC RECONSIDERATION

MANDY MILLER
Attorney for appellee
2910 Cmmcl Cntr Blvd., Ste. 103-201
Katy, TX 77494
SBN 24055561
PHONE (832) 900-9884
FAX (877) 904-6846
mandy@mandymillerlegal.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES 2

APPELLEE'S GROUND FOR EN BANC RECONSIDERATION 4

A majority panel of this Court erred in holding that the affidavit supporting the search of appellee's cell phone contained sufficient facts, coupled with rational inferences from those facts, to establish a fair probability that the search would likely produce evidence of the murder

STATEMENT OF FACTS 4

GROUND FOR EN BANC RECONSIDERATION 9

The majority erred in holding that the affidavit supporting the search of appellee's cell phone contained sufficient facts, coupled with rational inferences from those facts, to establish a fair probability that the search would likely produce evidence of the murder 9

The conclusion that there is a "clear nexus" between the vehicle appellee was driving and the capital murder is unsupported by the assertions in the affidavit. Any implicit findings to the contrary are unreasonable 9

The affidavit did not allege facts that the cell phone was used during the commission of the offense or shortly before or after. Thus, there is no evidence that the cell phone contained evidence of the offense 12

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 20

INDEX OF AUTHORITIES

CASES

Davis v. State,
202 S.W.3d 149 (Tex. Crim. App. 2006)..... 17

Diaz v. State,
No. 14-17-00685-CR, 506 S.W.3d 595, 2020 WL 4013189 (Tex. App.--Houston [14th Dist.] 2020, pet. filed) 13

Ford v. State,
444 S.W.3d 171 (Tex. App.--San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015)..... 9

Foreman v. State,
561 S.W.3d 218 (Tex. App.--Houston [14th Dist.] 2018, pet. granted) 16

Franks v. Delaware,
438 U.S. 154, 98 S. Ct. 2674, 2681, 57 L. Ed. 2d 667 (1978)..... 18

Humaran v. State,
478 S.W.3d 887 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd)..... 16

Riley v. California,
573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)..... 18

Rodriguez v. State,
232 S.W.3d 55 (Tex. Crim. App. 2007) 17

State v. Baldwin,
No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.--Houston [14th Dist.] Aug. 6, 2020, no pet. h.)..... 4, 5, 12

United States v. Weaver,

99 F.3d 1372 (6th Cir. 1996) 13

Walker v. State,
494 S.W.3d 905 (Tex. App.--Houston [14th Dist.] 2016, pet. ref'd) 16

OTHER AUTHORITIES

https://www.merriamwebster.com/dictionary/case#:~:text=cased%3B%20casing,material%20(such%20as%20metal%20pipe). 5

RULES

TEX. R. APP. P. 49.1 3
TEX. R. APP. P. 49.7 3

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, APPELLEE, by and through his undersigned attorney, and pursuant to Rule 49.7 of the Texas Rules of Appellate Procedure, and respectfully requests this Court for en banc reconsideration of the opinion in this cause delivered on August 6, 2020. A majority panel of this Court reversed the District Court's ruling suppressing the search of appellee's cell phone. *State v. Baldwin*, No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.--Houston [14th Dist.] Aug. 6, 2020, no pet. h.). In support thereof, appellee would show the Court the following:

APPELLEE'S GROUND FOR EN BANC RECONSIDERATON

The majority panel erred in holding that the affidavit supporting the search of appellee's cell phone contained sufficient facts, coupled with the rational inferences from those facts, to establish a fair probability that the search would likely produce evidence of the murder.

STATEMENT OF FACTS

The facts of this case are fairly straightforward and largely uncontested. Nevertheless, a summary will aid this Court in reviewing the ultimate legal issue.

Two African American males forced their way into the home of brothers Adrianus and Sebastianus Kusuma on September 18, 2016. (State's exhibit, 4). The perpetrators were masked and armed with handguns. (State's exhibit, 4). Sebastianus was beaten and Adrianus was shot and killed. (State's exhibit, 4). Sebastianus followed the men outside and observed them getting into a white, four-door sedan before leaving the scene. (State's exhibit, 4).

A subsequent investigation uncovered a neighbor who reportedly observed a white, four-door sedan exiting the neighborhood at approximately 8:45 p.m. at a "very high rate of speed." (State's exhibit, 4). Another neighbor informed law enforcement that she observed a white, four-door sedan, with license plate number GTK-6426, in the neighborhood on "multiple occasions" on September 17, 2016[1]. (State's exhibit, 4). The vehicle was occupied by "two black males." (State's exhibit, 4).

[1] The majority characterized the event as "[a] separate neighbor also came forward and said that she had seen a white, four-door sedan casing the neighborhood on the day before the capital murder. [Emphasis added] *Baldwin*, 2020 WL 4530149, at *1. "Casing" is a casual term used to indicate "to inspect or study especially with intent to rob." https://www.merriamwebster.com/dictionary/case#:~:text=cased%3B%20casing,material%20(such%20as%20metal%20pipe). This term was not used by the neighbor reporting the incident, nor did it appear in the search warrant.

A resident's surveillance video depicted a white, four-door sedan in the neighborhood once on September 18, 2016, and three times on September 19, 2016, which was the day after the murder. (State's exhibit, 4). A citizen also reported that he observed a white Lexus GS300 that "lapped his residence" three times. (State's exhibit, 4). The vehicle was driven by a "large black male[2]." (State's exhibit, 4).

On September 22, 2016, a vehicle bearing license plate GTK-6426 was stopped for alleged traffic violations. (State's exhibit 4). Appellee was driving and gave officers consent to search the vehicle, where a cell phone was recovered. (State's exhibit 4). Law enforcement obtained a search warrant for the contents of the phone. The affidavit provided:

> Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart" phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent

[2] Appellee is 5'9" and 180 lbs. (RR I 195).

voicemail messages could contain evidence related to this aggravated assault investigation.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime.

Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow Jaw enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information [sic] for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense.

Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy5, within a red and black case, serial #unknown, IMEI #unknown.

> Affiant believes that call data, contact data, and text message data, may constitute evidence of the offense of robbery or murder.

(State's exhibit 4)

Appellee filed a motion to suppress, challenging the legality of the traffic stop and the seizure and search of his cell phone. (CR 88-95). The hearing was presided over by Judge Denise Collins. Judge Collins made oral findings of fact and conclusions of law. (RR II 4-18). She determined that the traffic stop was lawful, but that the warrant failed to allege facts that established probable cause to believe that appellee's cell phone contained evidence of a crime. (RR II 17-18). Judge Collins did not sign a written order granting the motion to suppress. In January 2019, Judge Greg Glass was sworn in as the presiding judge of the 208th District Court. Judge Glass signed an order granting the motion to suppress in its entirety. (CR 96). The State appealed the order. (CR 97-99).

After oral argument, this Court abated the appeal and remanded the case to Judge Glass with instructions to clarify the scope of his order. *Baldwin*, 2020 WL 4530149, at *3. Upon remand, Judge Glass held a brief hearing, where he explained that he had intended to adopt all of Judge Collins's rulings. *Id.* Judge Glass then signed an amended order

granting the motion to suppress in part as to the cellphone evidence, and denying the motion to suppress regarding the legality of the traffic stop. *Id.*

GROUND FOR EN BANC RECONSIDERATION

A majority panel of this Court erred in holding that the affidavit supporting the search of appellee's cell phone contained sufficient facts, coupled with rational inferences from those facts, to establish a fair probability that the search would likely produce evidence of the murder

The conclusion that there is a "clear nexus" between the vehicle appellee was driving and the capital murder is unsupported by the assertions in the affidavit. Any implicit findings to the contrary are unreasonable

The majority held that the magistrate had a substantial basis for its implicit finding that the white vehicle that was observed by the witness after the murder was the same vehicle that was witnessed by the two neighbors in the days surrounding the murder. In support of this conclusion, the majority sites to *Ford v. State*[3] for the proposition that a vehicle similar in appearance to one observed near a crime scene is sufficient to establish probable cause to justify the issuance of a search warrant. This a misconstruction of the holding in *Ford*.

[3] 444 S.W.3d 171 (Tex. App.--San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015)

In *Ford*, the defendant was convicted of murdering his ex-girlfriend on the morning of January 1. *Ford*, 444 S.W.3d at 176-77. Law enforcement obtained warrants to search the defendant's home, vehicle, and to obtain his DNA. *Id.*, at 192. The affidavits contained statements that Ford was a recent ex-boyfriend of the deceased; he attended the same New Year's Eve party the night before as the deceased; he drove to the party in his white Chevy Tahoe; despite allegedly heading home after the party, Ford's friends did not see his Tahoe parked in his driveway after the party; surveillance photos depicted a vehicle similar to Ford's entering and exiting the deceased's condominium complex around 11:40 p.m.; surveillance photos showed a figure consistent in appearance with Ford walking into the complex at 11:42 p.m.; and male DNA was found on the towel covering the deceased's head. *Id.*, at 193. Further, the Tahoe was specifically described as having black roof rails and a black horizontal stripe on the lower quarter of the vehicle. *Id.*, at 180. Given the nexus between Ford and the murder from the information in the affidavits, the court held there is a fair probability evidence relating to the murder would have been found in Ford's vehicle, home, and DNA. *Id.*

Here, the affidavit provided that the witness observed the suspects fleeing the scene in a white, four-door sedan. (State's exhibit 4). The day before, a neighbor observed a white 4-door Lexus with license plate GTK-6426 in the neighborhood on multiple occasions. (State's exhibit 4). The vehicle was occupied by two African American men. (State's exhibit 4). Another neighbor observed a vehicle "similar in appearance" to the Lexus in the neighborhood on the day of and after the murder. (State's exhibit 4). There is no evidence that the white vehicle observed fleeing the scene of the murder is the same one observed by the neighbors, or that any of the white vehicles observed were the same.

In relying on *Ford*, the majority focuses on the similarity of the Tahoe to the vehicle in the surveillance photos but ignores the myriad of other evidence contained in that affidavit, including the prior relationship between Ford and the deceased, a man similar in appearance to Ford entering the deceased's residence, the absence of Ford's vehicle at his home when he reported that he was there, specific characteristics of the Tahoe, and male DNA on a towel covering the deceased's head.

The affidavit does not establish a nexus between the vehicle appellee was driving four days after the murder and the white sedan observed fleeing the scene after the murder. And while neighbors reported seeing a white, four-door sedan on the day before, of, and after the murder, there is nothing in the affidavit to support that they all saw the same vehicle. The only commonality is that they were white, four-door sedans. The inference that the vehicles were all the same is not supported by the statements in the affidavit, and therefore, unreasonable.

The affidavit did not allege facts that the cell phone was used during the commission of the offense or shortly before or after. Thus, there is no evidence that the cell phone contained evidence of the offense

The majority held that the affidavit contained sufficient facts, coupled with reasonable inferences, to establish a fair probability that a search of the cellphone would likely produce evidence of the capital murder. To reach this conclusion, the majority determined that the magistrate could have reasonably concluded that appellee participated in the murder. The majority concedes that this, alone, does not establish probable cause to justify the search of the cellphone. *Baldwin*, 2020 WL 4530149, at *5. It then acknowledges that "the rest of the affidavit

contained only generic recitations about the abstract use of cellphones." *Id.*, at *5. "These statements are 'boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct,' and affiants should not rely on such generalizations because they run the risk 'that insufficient particularized facts about the case or the suspect will be presented for a magistrate to determine probable cause.'" *Id.*, at *6, quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

Despite such criticism and caution, the majority veers and relies on one of the "generic" and "boilerplate recitations" to establish probable cause that the phone contained evidence of the offense. *Id.*, at *6. "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." (State's exhibit 4). Based upon this, the majority held that "the magistrate had a substantial basis for believing that a search of the cellphone would probably produce evidence of preparation, which would also include evidence of the identity of the other person who participated in the capital murder." *Id.*

To support its holding, the majority cites to uncontrolling authority from outside jurisdictions. It also relies on a recent opinion from this Court. *See Diaz v. State*, No. 14-17-00685-CR, 506 S.W.3d 595, 2020 WL 4013189 (Tex. App.--Houston [14th Dist.] 2020, pet. filed)[4]. In *Diaz*, a police officer's home was burglarized by two men. *Id.* The complainant and the suspects engaged in a shootout and the suspects fled. *Id.* Law enforcement recovered the back cover of a cell phone and a cell phone battery from the scene. *Id.*

Agents with the Drug Enforcement Agency contacted the investigating detective and revealed that one of their informants had information about the burglary. *Id.* The informant identified one of the suspects, as "Jessie." *Id.* The detective learned that "Jessie" was Diaz and that he had outstanding warrants for armed robbery and kidnapping out of Georgia. *Id.* Diaz was arrested and several cell phones in his possession and the vehicle he was in were confiscated. *Id.*

A Harris County District Attorney's Office Investigator submitted an affidavit in support of a search warrant for the cell phones. *Id.* The

[4] Notably, Justice Christopher was a part of the majority in *Diaz* and wrote the opinion currently at issue. Additionally, a petition for discretionary review was filed by Diaz since the release of this opinion.

affidavit stated that the detective received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion" and that the "tipster" provided two phone numbers for the suspect. *Id.* The affidavit also asserted that, based on the detective's training and experience, he "knew persons who commit home invasions are commonly involved in the illegal narcotics trade," so he requested the DEA to run the phone numbers through its database. *Id.* One of the phone numbers was registered to Diaz. *Id.*

On appeal, Diaz argued that nothing, "other than the officer's generalized assumptions" that criminals utilize cellular telephones to communicate and share information regarding crimes they commit, connected the specified offense with the phones to be searched. *Id.* A majority of this Court disagreed and held that the facts contained in the affidavit and reasonable inferences therefrom provided a sufficient basis from which the magistrate reasonably could conclude that a fair probability or substantial chance existed that evidence of home invasion would be found on the cell phones. *Id.* Specifically, the majority cited to the cell phone parts that were found at the scene of the crime. *Id.* An informant identified Diaz as a suspect. *Id.* The informant also provided

a phone number for the suspect, which was registered to Diaz. *Id.* The affidavit also stated that DNA testing could not exclude the defendant as a source of DNA on the sunglasses left at the scene, thus directly tying Diaz to the crime scene. [Emphasis added] *Id.*

This Court should not rely on its recent ruling in *Diaz* to support reversing the District Court. Unlike in *Diaz*, there is no evidence tying appellee to the offense.

Further, the majority ignores its own precedent to reach its conclusion. In *Foreman v. State*, this Court noted that an affidavit offered in support of a warrant to search the contents of a cell phone must usually include facts that a cell phone was used during the crime or shortly before or after. *Foreman v. State*, 561 S.W.3d 218, 237-38 (Tex. App.--Houston [14th Dist.] 2018, pet. granted) (en banc) (citing *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.--Houston [14th Dist.] 2016, pet. ref'd); *Humaran v. State*, 478 S.W.3d 887, 893-94 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd)).

Even the lead detective and affiant conceded that she had no proof that evidence of the murder would be contained on the phone. (RR I 148, 149). At best, the affidavit contains unreasonable inferences that are not

supported by any facts that the phone in appellee's possession contained evidence of the offense. The majority erred in concluding otherwise.

CONCLUSION

To overrule the District Court, the majority had to assume the following inferences were reasonable:

1. The white sedan observed fleeing the scene of the murder was the same sedan witnessed by neighbors in the days surrounding the murders.

2. Appellee was one of the African American men seen in the white sedan in the days surrounding the murders.

3. Thus, appellee was involved in the murder.

4. Appellee used a cell phone to plan, coordinate, and/or cover up the murder.

5. The cell phone used to plan, coordinate, and/or cover up the murder was the same one located in the vehicle appellee was driving.

There are no facts to support any of the above inferences. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id.* at 157.

Probable cause cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

In *Riley v. California*, the United States Supreme Court unanimously held that the search incident to arrest doctrine did not authorize the warrantless search of a cell phone. 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In reaching its conclusion, the Court cited to the vast amount of private information people now hold on their cellular devices. *See id.*, at 2490 (Cell phones differed from other physical objects both quantitatively and qualitatively, given phones' immense storage capacity, collection in one place of many distinct types of private information, and ability to convey more information than previously possible, and phones also presented issue that they can access information not stored on phones themselves, which information government conceded was not covered by this exception.). The Court refused to permit the search of a cell phone incident to arrest based upon an officer's reasonable belief that information relevant to crime of arrest, arrestee's identity, or officer safety would be discovered. *Id.*, at 2492.

The Supreme Court mandates that law enforcement needs more than just a generalized suspicion that a cell phone contains evidence of a crime to search the phone. *See Franks v. Delaware*, 438 U.S. 154, 165, 98 S. Ct. 2674, 2681, 57 L. Ed. 2d 667 (1978) (A warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause.). Simply putting general statements and beliefs into an affidavit, without specific facts pertinent to the investigation, results in a virtual search incident to arrest. This violates both federal and state precedent.

It is respectfully submitted that appellee's motion for en banc reconsideration be granted, the majority opinion vacated, and a new opinion issued upholding the District Court's motion to suppress.

/s/ Mandy Miller
MANDY MILLER
Attorney for appellee
State Bar No: 24055561
2910 Cmmcl Ctr. Blvd., Ste. 103-201
Katy, TX 77494
(832) 900-9884
Fax: (877) 904-6846
mandy@mandymillerlegal.com

CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellee's motion for en banc reconsideration, filed on September 11, 2020, has 3,871 words based upon a word count under MS Word.

/S/Mandy Miller
MANDY MILLER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been delivered via electronic mail to the following:

Cory Stott
stott_cory@dao.hctx.net

/s/ Mandy Miller
MANDY MILLER

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Mandy Miller on behalf of Mandy Miller
Bar No. 24055561
mandy@mandymillerlegal.com
Envelope ID: 46175984
Status as of 9/14/2020 8:07 AM CST

Associated Case Party: Harris County District Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
Dan McCrory		mccrory_daniel@dao.hctx.net	9/11/2020 4:57:26 PM	SENT
Cory Stott		Stott_Cory@dao.hctx.net	9/11/2020 4:57:26 PM	SENT

Associated Case Party: JohnWesleyBaldwin

Name	BarNumber	Email	TimestampSubmitted	Status
Brian Marc Roberts	24041790	brian@bmrlawyer.com	9/11/2020 4:57:26 PM	SENT
Robert Albert Scardino	17719500	robert@sflawtx.com	9/11/2020 4:57:26 PM	SENT